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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

VICTOR CARMICHAEL et al.,

Petitioners and Appellants,

v.

CITY OF PACIFICA,

Respondent,

DAVID BLACKMAN & MIKE O'CONNELL,

Real Parties in Interest.

A153630

(San Mateo County
Super. Ct. No. 17CIV00042)

In early 2015, real parties in interest David Blackman and Mike O'Connell submitted an application to the Planning Commission of the City of Pacifica (Commission) to build four detached studio apartments on a triangular-shaped lot at 4009 Palmetto Avenue (the original project). Commission staff prepared a report recommending that the application be approved, and a public hearing was held on April 6, 2015. The report concluded that the project was subject to the so-called "Class 3" exemption to the requirements of the California Environmental Quality Act (CEQA) that applies to "apartments, duplexes, and similar structures designed for not more than

six dwelling units" in "urbanized areas." (14 Cal. Code Regs. § 15303, subd. (b).)[1] Petitioners and appellants Victor Carmichael and members of the Committee to Save the Fish and Bowl 2.0 appeared at the hearing to oppose the project. At the hearing's conclusion, the Commission voted to approve the application and granted real parties a site development permit, a coastal development permit, a variance, and a parking exception.

Petitioners appealed the Commission's decision to the Pacifica City Council. City Council staff prepared a report addressing Petitioners' arguments and recommending that the appeal be denied, and a hearing was held on June 22. After the hearing, the City Council denied the appeal and upheld the Commission's decision to approve the original project.

On July 10, Petitioners appealed the decision to issue a coastal development permit for the original project to the California Coastal Commission (CCC). In a July 31 report, Coastal Commission staff concluded that "the appeal raises a *substantial issue* of conformity of the approved project with the biological resources, coastal hazard, and traffic policies of the certified Pacifica [Local Coastal Program]" (LCP) and recommended that the Coastal Commission take jurisdiction over the coastal development permit application for the original project. The Coastal Commission required real parties to submit a "wetland delineation conducted pursuant to the Coastal Commission criteria of habitats in and adjacent to the site; an updated hazards report that is a design level geotechnical investigation, specific to the hazards present on the site; and an independent verification of the trip generation analysis the Applicant prepared."

In addition to preparing the reports requested by the Coastal Commission, real parties revised the original project to: (1) combine the four detached apartments into a single three story building consisting of four attached apartments; and (2) provide for a 50-foot wide buffer around a .02-acre wetland located on the property (the project).

[1] Further unspecified statutory references are to Title 14 of the California Code of Regulations.

Coastal Commission staff prepared a report on the project as revised, and a hearing was held on April 13, 2016. The Coastal Commission concluded that "approval of the development adequately protects the site's biological resources, and adequately addresses impacts related to coastal hazards, traffic, and visual character. Accordingly, the Commission finds that the project, as conditioned, is consistent with the certified City of Pacifica LCP." The Coastal Commission found that "only as modified and conditioned by this permit will the proposed project avoid significant adverse effects on the environment within the meaning of CEQA." On May 4, the Coastal Commission issued a "Notice of Intent to Issue [a Coastal Development] Permit" (CDP) for the project.

Real parties then applied to the City of Pacifica for an amended site development permit, variance, and parking exception for the project.

Commission staff prepared a report and the Commission held a hearing on the project on September 6. The report recommended that the Commission approve the project and determine that it qualified for the Class 3 categorical exemption from CEQA. It also noted that there was a heritage tree located on an adjacent property and that the dripline of that tree was within the proposed development area, such that "[t]he applicants would need to obtain a Heritage Tree Permit prior to constructing within the dripline of the tree." The Commission continued the hearing until October 17.

Before that hearing, Commission staff prepared a supplemental report indicating that real parties had submitted a revised design for the project's proposed storm drain infrastructure on September 19, moving the drain from "the east side of the arroyo willow to within the already developed street on the west side of the arroyo willow." The report stated that "[r]ecent conversations between City and CCC staff suggest that the revised location of the storm drainage is acceptable to CCC staff and would not trigger the need for an amendment to the existing CCC CDP approval." The report concluded that the "proposed revisions to the storm drain infrastructure would be exempt from CEQA under both the Class 2 Categorical Exemption and the Class 4 Categorical Exemption." After

the hearing, the Commission approved the project and issued an amended site development permit, variance, and parking exception.

Petitioners appealed that decision to the City Council. City Council staff prepared a report recommending that the project be approved, and a hearing was held on December 12. As part of the report, staff recommended that "[i]f the Coastal Commission will not permit construction of a sidewalk along the entire frontage of the property along Palmetto Avenue, the owner shall install as much sidewalk as the Coastal Commission will permit, and shall also install a mid-block crosswalk . . . to connect the property to the future development of Coastal Trail on the west side of Palmetto Avenue." After the hearing, the Council voted 4-1 to deny the appeal and uphold the Commission's approval of amendments to the site development permit, variance, and parking exception. The City filed a "Notice of Exemption" for the project on December 14.

On January 4, 2017, Petitioners filed a petition for a writ of administrative mandate with the trial court. They argued that the project was improperly found to be exempt from CEQA and that the site development permit and variance were unlawfully issued. The petition came on for hearing on October 12, following which hearing, on December 18, the trial court issued a 53-page decision denying the petition, from which Petitioners appeal.

## DISCUSSION

### I. *Petitioners Failed to Exhaust Administrative Remedies With Respect to Their CEQA Arguments*

Petitioners argue that the wetlands buffer and the mid-block cross walk are not exempt from CEQA under the Class 3 exemption, which applies to "apartments, duplexes, and similar structures designed for not more than six dwelling units" and "[w]ater main, sewage, electrical, gas, and other utility extensions, including street improvements, of reasonable length to serve such construction." (14 Cal. Code Regs. § 15303, subds. (b) & (d).) They further argue that the revised storm drain is not exempt from CEQA under the Class 2 exemption for "replacement or reconstruction of existing

structures and facilities" and the Class 4 exemption for "minor public or private alterations in the condition of land, water, and/or vegetation." (§ 15304.) Finally, they argue that the project was subject to CEQA because it presented "unusual circumstances" (§ 15300.2, subd. (c)), because it was located in a "particularly sensitive environment" (§ 15300.2, subd. (a)), and because of the project's "cumulative impacts" (§ 15300.2, subd. (b)).

Real parties respond that Petitioners have failed to demonstrate that they exhausted their administrative remedies with respect to their CEQA arguments by adequately raising them at the administrative level. We agree.

**A. *Applicable Law***

No action or proceeding may be brought alleging non-compliance with CEQA "unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Res. Code § 21177, subd. (a).) "Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.) The exhaustion doctrine requires Petitioners to show they presented the exact issue to the agency and raised " 'sufficiently specific' " objections. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 623; *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909.) Petitioners bear the burden of demonstrating that the issues raised in a judicial proceeding were first raised at the administrative level. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1136.) We employ a de novo standard of review when determining whether the exhaustion of administrative remedies doctrine applies. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873.)

### B. *Class 3 Exemption for Wetlands Buffer and Mid-block Crosswalk*

Petitioners argue that the wetlands buffer and the mid-block crosswalk are "not within the terms of [section] 15303 nor are they utility or electrical work nor are they similar to an apartment." In arguing that they exhausted administrative remedies with respect to this argument, they rely on the following language from a letter dated May 26, 2015 from Petitioners' counsel to the City of Pacifica Planning Department (Planning Department):

"Moreover, §15303 is not applicable in the present case by its own terms. The staff report states . . . 'The construction of four (4) studio apartments is consisted [*sic*] with this exemption.' However, the staff report ignores the retaining wall that would be built – 'A retaining wall is also being proposed along the front of the property on the southwest portion of the property.' The staff report also ignores the fact that, 'Stormwater will be conveyed from the overflow drain/bioretention area via a l2-inch storm drain pipe that would connect to the existing catch basin 140 feet south of the property.' Neither retaining walls nor systems to collect and treat stormwater nor offsite catch basins are mentioned in or covered by §15303. [¶] Also, §15303(b) covers structures 'in urbanized areas.' However, the proposed project is in an undeveloped area."

Obviously, this language makes no mention of the wetlands buffer, nor the mid-block crosswalk, nor does it offer any argument whatsoever that the Class 3 exemption does not apply to those aspects of the project. Nor could it, as the wetlands buffer was not added to the project until it was revised following Petitioners' appeal to the Coastal Commission, over a month after this letter was written, and the mid-block crosswalk was not added to the project until shortly before the December 12, 2016 hearing, several months after that.

On reply, Petitioners acknowledge that the May 26 letter predates the addition of the wetland buffer and the mid-block crosswalk to the project. However, they argue that in two letters dated November 9 and November 26, 2016, their counsel somehow incorporated and applied their arguments to the buffer and the crosswalk by asking the

Planning Department to "consider my comments herein in addition to those I have submitted earlier" and "request[ing] that you consider all of [my previous] comments along with my present comments." Petitioners also point to a December 11, 2016 letter arguing that the mid-block crosswalk was not subject to an exemption from CEQA under section 15300.2, subdivisions (a), (b), and (c), and to comments made at the December 12 hearing by Petitioners' counsel objecting to the crosswalk on the grounds that it was "done in haste at the last minute and is not well-thought through."

In the first place, these additional arguments are waived because they are raised for the first time on reply. (See *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1232.) They are also meritless. The May 26 letter makes no reference to the wetlands buffer or the crosswalk, and incorporating the comments therein by reference in later letters does not either. And the December 2016 letter and public comments regarding the crosswalk make no mention of the Class 3 exemption, nor do they offer any explanation how the crosswalk is not within its terms. Petitioners have failed to demonstrate that they have exhausted their administrative remedies with respect to their arguments regarding the wetland buffer and the crosswalk.

**C.** ***Class 2 & Class 4 Exemptions for the New Storm Drain***

Petitioners next argue that the Class 2 exemption for "replacement or reconstruction of existing structures and facilities" and the Class 4 exemption for "minor public or private alterations in the condition of land" do not apply to the revised storm drain. (§§ 15302, 15304.) In arguing that they exhausted their administrative remedies with respect to this issue, Petitioners concede that they did "not explicitly refer to Class 2 or Class 4 exemptions" at the administrative level, which is entirely fatal to their argument. However, they claim that they exhausted their administrative remedies because they argued in general terms that the "[p]roject did not fall within the terms of a categorical exemption" and, even more vaguely, that "they addressed all issues that they raised in the trial court and which they are now raising in the Court of Appeal." In support of this last statement, Petitioners then provide citation to well over 400 pages of

the administrative record.[2] We will not comb through the record in order to make Petitioners' arguments for them. (See Cal. Rules of Court 8.204, subd. (a)(1); *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.)

As before, Petitioners introduce new arguments on reply, arguing that "objections concerning the storm drain were raised multiple times," with citation to various objections to the storm drain, none of which mention the Class 2 or Class 4 exemptions. These arguments are waived, and more importantly, the record citations given do not establish that Petitioners argued that the Class 2 or Class 4 exemptions did not apply at the administrative level.

Petitioners also argue that they must have raised their Class 2 and Class 4 arguments to the Commission, because the Commission responded to them, citing to certain statements by the Commission that the project qualified for the Class 2 and 4 exemptions. But the fact that the Commission concluded that the storm drain qualified for the Class 2 and Class 4 exemptions does not mean that Petitioners ever argued that it did not. In short, Petitioners have failed to demonstrate that they exhausted their administrative remedies with respect to their argument that the Class 2 and Class 4 exemptions do not apply to the storm drain.

### D. *Unusual Circumstances, Cumulative Impact, and Particularly Sensitive Environment Exceptions*

Petitioners argue that the project was subject to CEQA because it presented "unusual circumstances" (§ 15300.2, subd. (c)), because it was located in a "particularly sensitive environment" (§ 15300.2, subd. (a)), and because of the project's "cumulative impacts" (§ 15300.2, subd. (b)).

In their opening brief, Petitioners offer no argument that they have exhausted their administrative remedies with respect to these issues. The two pages in their opening brief regarding exhaustion of administrative remedies does not discuss the three exceptions in section 15300.2, subdivisions (a), (b), or (c) at all. This alone is fatal to Petitioners'

[2] This does not include Petitioners' reference to "AR 1473-1258," which was presumably intended to encompass yet more pages of the administrative record.

appeal. (See *W.S. v. S.T.* (2018) 20 Cal.App.5th 132, 149, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned"].)

On reply, Petitioners devote two pages to the issue of exhaustion with respect to the unusual circumstances and cumulative impacts exceptions, and make no mention of the particularly sensitive environment exception. Again, these arguments are waived. The reply brief contains no argument or analysis, but merely a list of record citations discussing the factual issues on which Petitioners base their claims. The vast majority of these record pages make no mention of the unusual circumstances or cumulative impact exceptions. The one exception is the October 17, 2016 Planning Commission staff report, cited with respect to the unusual circumstances exception, which briefly discusses staff's view that "[t]he presence of an Arroyo [W]illow . . . is not an unusual circumstance." But the fact that staff reached this conclusion does not mean that Petitioners adequately raised and articulated the arguments they now raise below. Petitioners have failed to demonstrate that they exhausted their administrative remedies with respect to these arguments.

## II. *Petitioners Have Failed to Demonstrate That The City Violated Its Zoning and Planning Laws*

Petitioners argue that the City failed to require a tree protection plan under Pacifica Municipal Code (PMC) section 4-12.07, subdivision (a); that the City should not have issued a site development permit because the project will "excessively damage or destroy natural features" (PMC § 9-4.3204, subd. (a)(6)); that the project was inconsistent with the local coastal plan (PMC § 9-4.3204, subd. (a)(9)); and that the City should not have issued a variance under PMC section 9-4.3404.

### A. *Tree Protection Plan Under PMC section 4-12.07, subdivision (a)*

As noted, the City concluded that the dripline of a heritage tree was within the proposed development area and stated that real parties would be required to obtain a heritage tree permit pursuant to PMC section 4-12.08.[3]

[3] PMC section 4-12.08 provides: "If an application for a building permit would require the cutting down, destruction, moving, or removal of a heritage tree or trees, or

However, Petitioners argue that the City failed to comply with PMC section 4-12.07, subdivision (a), which provides that "[a]ny development proposal which requires a discretionary permit or other land use approval as set forth in Title 9 of this Code, and which includes a proposal to cut down, destroy, remove, move, or engage in construction within the dripline of a heritage tree, must be accompanied by a tree protection plan which shall insure the preservation of trees where possible and the protection of trees during construction so as to maximize chances for their survival."

Petitioners must demonstrate that they exhausted their administrative remedies with respect to this argument. (See *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447–1448; Gov. Code § 65009, subd. (b)(1).) Again, Petitioners' opening brief does not discuss exhaustion of administrative remedies with respect to this argument at all, and accordingly it fails for this reason alone.[4]

On reply, Petitioners cite to a December 7, 2016 email from Victor Carmichael regarding a large Monterey Cypress tree just north of the project. The email notes that construction may affect the tree and its root structure, but makes no mention of PMC section 4-12.07 or a tree protection plan. Neither do Carmichael's comments at the December 12 hearing.

Petitioners further argue that they must have raised their argument below because the City "responded to it" by requiring real parties to obtain an arborist's report. But as noted, the arborist's report was prepared in connection with the heritage tree permit. In

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would involve new construction within the dripline of a heritage tree, the applicant shall be required to obtain a permit under this chapter for the removal or destruction of a heritage tree. As used in this section, 'destruction' shall include substantial trimming which threatens the healthy growth and development of the tree."

[4] The trial court appears not to have considered whether Petitioners exhausted their administrative remedies with respect to this argument, concluding instead that the decision to require a tree permit in lieu of a tree protection plan was not an abuse of discretion.

short, Petitioners have failed to demonstrate that they exhausted their administration remedies with respect to their tree protection plan argument.[5]

**B. *PMC section 9-4.3204, subdivision (a)(6)***

Petitioners argue that the City was prohibited from issuing a site development permit because the project would "excessively damage or destroy natural features" (PMC § 9-4.3204, subd. (a)(6)) based on alleged damage to heritage trees, wetland, and a coastal ravine.

The trial court in an administrative mandamus proceeding reviews the agency's factual findings under the substantial evidence test. (Code Civ. Proc., § 1094.5, subd. (c); *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144.) "In reviewing the agency's decision, the trial court examines the whole record and considers all relevant evidence, including evidence that detracts from the decision." (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 921.) Substantial evidence means evidence " ' " 'of ponderable legal significance.' " ' " (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 99.) The evidence " ' " 'must be reasonable in nature, credible, and of solid value.' " ' " (*Ibid*.) We review the agency's decision, rather than the trial court's decision, applying the same standard of review applicable in the trial court. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427; *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839, 851–852.)

***Heritage Tree***

Petitioners argue that the project would "excessively damage or destroy" natural features because it would necessarily destroy the above-mentioned heritage tree. This is so, according to Petitioners, because as a condition of approval, the real parties are required to obtain a heritage tree permit and such permits "are intended to allow the removal of Heritage trees," and therefore the granting of such a permit "guarantees destruction of the tree." But as the following discussion from the September 6, 2016

[5] Petitioners also argue, for the first time on reply, that they were excused from exhausting their administrative remedies with respect to the tree protection plan because requesting one would have been futile. We will not consider this argument.

Commission hearing makes clear, the permit was not intended to permit destruction of the tree:

"COMMISSIONER CLIFFORD: The heritage tree permit, what does it actually entail for this particular job?

"MS. WEHRMEISTER [planning director]: So we are, typically, used to hearing about heritage tree removal permits, but there's also a process in our code to protect heritage trees. And when there's construction within the drip line of a heritage tree, you pull a heritage tree permit, but the purpose of the permit is to have an arborist review and look at your development plan so that you are protecting the tree.

"COMMISSIONER CLIFFORD: So that you're protecting, basically, the roots of the tree, right?

"MS. WEHRMEISTER: Yes.

"COMMISSIONER CLIFFORD: Okay. Thank you. I wanted to be clear on that. We weren't—we weren't authorizing him to cut down somebody else's tree."

And at the December 12, 2016 hearing:

"MR. O'CONNELL: . . . Talk a little bit about the tree. We did get a—an arborist report, and he did provide some recommendations about things we can do, ways we can design the foundation to potentially limit impacts to that tree, which is mostly like using a—deep foundation, so, a drilled pier, which is sort of a—long, skinny foundation, and those can be spaced every six to eight feet. And that's usually better around trees because it doesn't require this wide, continuous footing that requires a bigger excavation. So the arborist feels there is—there is a solution to that, an engineering solution, and he also provided recommendations about, you know, arborist being on-site during construction and how to cut the roots and give the—give the tree the best chance of—surviving that. It's not on our property although we have had a discussion with the adjacent property owner, who is comfortable removing it if it—if it doesn't survive the construction."

This is substantial evidence in support of the finding that the project would not "excessively damage or destroy" the heritage tree, and Petitioners' argument fails.

***Wetland***

In a brief two paragraphs, Petitioners argue that the project will excessively damage the wetland near the project because the project includes a sidewalk through the wetland and a storm drain "very near" the wetland and through the wetland buffer.

Petitioners do not cite any support in the record for their assertion that the sidewalk or storm drain will pass through the wetland buffer, or that the project will cause any excessive damage. The only page they do cite in their entire argument is from the December 12, 2016 conditions of approval for the site development permit, and simply indicates that real parties will "construct a sidewalk along . . . the entire frontage of the property along Palmetto Avenue," unless the Coastal Commission will not allow it, in which case they are to install a mid-block crosswalk "to connect the property to the future development of Coastal Trail on the west side of Palmetto Avenue." Petitioners have failed to support their argument with citations to the record.[6] (See *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

***Coastal Ravine***

The sum total of Petitioners' argument regarding erosion of the coastal ravine is as follows: "Although the City attempted to justify its decision not to make a finding under Subsection (a)(6) regarding the Heritage trees and the wetland the City failed and refused to address damage to and destruction of the eroding coastal ravine. There is no substantial evidence to support the City's determination that the Project will not excessively damage or destroy the eroding coastal ravine. In fact, there is considerable evidence in the record to the contrary as discussed [on pages 17–20 of Petitioners' brief] under the heading 'The Class 2 Exemption is Not Applicable.' "

[6] Again, we will not consider Petitioners' additional arguments raised for the first time on reply. (See *W.S. v. S.T.*, *supra*, 20 Cal.App.5th at p. 149 fn. 7.)

But the referenced section of Petitioners' brief mentions erosion only in the context of an argument that the new storm drain does not qualify for the Class 2 exemption. Again, Petitioners have failed to articulate their argument and support it with citations to the record.

**C.** ***Local Coastal Plan and PMC section 9-4.3204, subdivision (a)(9)***

PMC section 9-4.3204, subdivision (a)(9) provides that a site development permit shall not be issued if "the proposed development is inconsistent with the General Plan, Local Coastal Plan, or other applicable laws of the City."

Petitioners assert that the project is inconsistent with the General Plan, Local Coastal Plan, and applicable laws because there is no tree protection plan, because the project includes a sidewalk through wetlands, and because the General Plan and Local Coastal Plan "prohibit construction of the Project unless and until the City completes required improvements to Manor Drive at Palmetto Avenue and at Oceana Boulevard and to the Manor Drive Bridge." We have already discussed and rejected Petitioners' argument that a tree protection plan was required and that the project requires a sidewalk through wetlands. With respect to required improvements pursuant to the Local Coastal Plan, Petitioners mischaracterize the record. Their argument relies on the following language from the Pacifica Local Coastal Plan:

"Streets within Fairmont West are adequate to accommodate traffic generated by additional commercial and residential development. However, due to capacity problems of the Palmetto Avenue/Manor Drive/Oceana Boulevard intersection, any significant increase in the number of vehicles resulting from intensified commercial or additional residential development in the vicinity of Manor Drive, or along Palmetto Avenue, should be accompanied by traffic studies which anticipate peak hour traffic impacts on the intersection. In order to accommodate and encourage expanded access opportunities and related visitor-serving land uses in the neighborhood to the south, residential development in Fairmont West shall not occur without resolution of traffic impacts which could adversely affect the viability of access related and visitor-serving commercial development in the area. However, street widening may not be easy to implement

because of elimination of on-street parking and limited right-of-way. Decreasing densities on residential sites may alleviate traffic impacts, especially at peak hours, when flow is unstable and queues develop."

This section does not require "improvements" to the roads at issue, but rather that "any significant increase in the number of vehicles resulting from . . . additional residential development . . . should be accompanied by traffic studies which anticipate peak hour traffic impacts on the intersection." Petitioners had such a study conducted, their expert concluded that the Project would generate "approximately 27 daily vehicle trips, with 2 trips occurring during the AM peak hour and 2 trips during the PM peak hour", and on this basis, the City determined that the traffic impacts of the Project would be "negligible." Substantial evidence supports the City's conclusion that the project is not inconsistent with the Local Coastal Plan.

## III. *Petitioners Have Not Demonstrated That the City Unlawfully Granted a Variance for the Project*

The City granted real parties a variance authorizing them to build private decks within the side setback on the project. PMC section 9-4.3404, subdivision (a) requires the City to make four findings to issue such a variance, and Petitioners argue that the two of the four findings are unsupported by substantial evidence.

### S*ubdivision (a)(1) – Special Circumstances*

PMC section 9-4.3404, subdivision (a)(1) required the City to find that "because of special circumstances applicable to the property, including size, shape, topography, location, or surroundings, the strict application of the provisions of this chapter deprives such property of privileges enjoyed by other property in the vicinity and under an identical zoning classification." Petitioners assert that "the City's findings fail to explain e.g. what the 'other properties' are or how they differ from the Project or how restricting the Project to 'just one area of the property' is a special circumstance."

The City found as follows: "The property is nearly an isosceles triangular shaped lot that has side lot lines that converge towards the rear of the property. The overlay of the Edgemar Road easement that runs along the south side of the property reduces the site

to an irregular shaped area with a rear lot line that is significantly closer to the front lot line. A willow (*S. lasiolepis*) patch located in the road easement along the front lot line qualifies as sensitive habitat as defined in the Local Coastal Land Use Plan. The CCC conditioned as part of the CDP approval that the proposed development would occur outside of a 50 ft. buffer around the willow patch, which prevents development within most of the west and south portions of the lot. As a result, the development is condensed to the northern side of the lot.

"The only developed property zoned R-3-G/CZ is the Dollaradio facility across the street. Other properties in similar zoning districts, including R-3 are not typically burden[ed] with so many development restrictions that reduce the amount of developable land to just one area of the property. Without the variance Apartment #3 would have approximately 35 less square feet in their private deck resulting in a 55 square foot deck, and Apartment #1 would have approximately 32 less square feet in their private deck, resulting in a 143 square foot deck. Additionally, without the variance, the private deck off of Apartment #1 would include a 1 foot wide deck on the north elevation, which would result in an approximately 11.5 foot long portion of the deck that would be 1 foot wide. This portion of the deck would not provide any practical open space area and would only provide an aesthetic benefit. The variance would provide two of the units with private open space."

Contrary to Petitioners' suggestion, the City did explain how other properties differed from the Project and how the unique geography of the project property presented special circumstances. This is substantial evidence in support of the City's decision to grant a variance.

S***ubdivision (a)(4) – Local Coastal Plan***

PMC section 9-4.3404, subdivision (a)(4) provides that in order to grant a variance, the City must find that the "application is consistent with the applicable provisions of the Local Coastal Plan." The City found that this condition was satisfied because the project "has already obtained its Coastal Development Permit, which concludes that it is consistent with the Local Coastal Plan." Petitioners argue that this

was error because the permit has not in fact been issued, and because the project has been revised since the Coastal Commission approved it.

Petitioners' argument that the permit has not been issued yet appears to rely on the fact that the Coastal Commission required several "special conditions" be satisfied before the permit would issue, and a November 8, 2016 email from the Commission indicated that Petitioners' intention was to "acquire all City entitlements" before satisfying those conditions.

Whether the permit has actually been issued or not, the Coastal Commission conducted a lengthy and detailed analysis of the project spanning some 20 pages and concluded that, with certain conditions, it was consistent with the certified City of Pacifica Local Coastal Plan. Petitioners have not explained how either the fact that the permit itself has yet to issue or the subsequent revisions to the project call into question any of the Commission's conclusions. Accordingly, they have failed to carry their burden to demonstrate that the Commission's findings were not supported by substantial evidence. (See *Eskeland v. City of Del Mar* (2014) 224 Cal.App.4th 936, 942.)

**DISPOSITION**

The order is affirmed.

_____
Richman, Acting P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

*Carmichael v. City of Pacifica* (A153630)